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No. 06-427

IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

—v.—

BRENTWOOD ACADEMY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

This brief is submitted on behalf of *amicus curiae* Association of Christian Schools International ("ACSI").[1] ACSI is a nonprofit organization that exists to equip Christian educators in the United States and abroad to teach children effectively. It does so by providing to its member schools a variety of services, including student activities, school accreditation, administrative certification, legal and legislative services and the like. ACSI currently has 3,796 member K-12 schools with 740,882 students in the United States. Brentwood Academy ("Brentwood") is a member of ACSI.

ACSI submits this brief because of its strong interest in preserving the First Amendment rights that make real school choice possible — rights that would be threatened if the ruling of the Court of Appeals were reversed. At issue in this case is a so-called Recruiting Rule of a Tennessee athletic association, previously held by this Court to be a state actor, that cuts deeply into the ability of private schools to describe their athletic programs to parents of prospective students and to the students themselves. Coaches in particular are singled out for especially sweeping speech restrictions. Before students are enrolled and have attended classes for three days, coaches are barred from contacting them and from discussing need-based financial aid at all. Even if the student initiates contact with respect to need-based financial aid, an often itical subject for parents and students deciding which school to attend, the coach may not respond.

The effect of the Recruiting Rule is therefore to ban discussion of entire topics — athletics and need-based finan-

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[1] This brief *amicus curiae* is submitted with the consent of all parties to these actions. Letters to that effect have been filed with the Court. No counsel for a party authored this brief in whole or in part.

cial aid — by particular persons for long periods of time. The Recruiting Rule is thus a content-based restriction on speech subject to strict scrutiny under the First Amendment, a legal test that cannot be met by the Tennessee Association. The Sixth Circuit held, incorrectly in our view, that the rule was content neutral but nonetheless held it unconstitutional on an as applied basis. In this brief, we urge the Court to apply strict scrutiny and on that basis to hold the relevant portions of the Recruiting Rule unconstitutional.

ACSI believes that its member schools have a right to tell parents of prospective students about the education that they offer: one that emphasizes intellectual, physical, and spiritual development. An accurate and complete description of that education necessarily includes information about the schools' athletic programs, and about the need-based financial aid that can make such education attainable for lower-income families. ACSI also believes that prospective students and their parents have a corresponding right to receive the information necessary to determine which school best fits their educational and economic needs. The government's role in regulating interscholastic sports cannot justify abridging the long-standing right of schools, students, and parents to share truthful information about education. Carefully drafted rules to prevent the exploitation of student-athletes serve parents and children alike, but sweeping limits on speech about education disserve all.

At an earlier stage in this case, two of the nation's leading educators, Chester E. Finn, Jr. and Daniel Casse,[2] summed up the core issues in this litigation:

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[2] Finn is the president of the Thomas B. Fordham Foundation, which supports research on national education issues, and is a former Assistant Secretary of Education for Research and Improvement and a founding member of the Edison Project. Casse is a senior director of the White House Writers Group and has served as an aide to the Secretary of Education.

> [T]his is a case involving fundamental First Amendment freedoms, which in this case arise in an athletic context but which go to the heart of issues involving access to quality education and school choice. . . . The hostility to students' access to choices in selecting their secondary school is palpable in the regulation under challenge. And the particular method of resisting access to educational quality through choice — the suppression of speech — is peculiarly odious in a democratic society because it suggests that government somehow has a right to expect students to attend (and play sports for) public schools. But children are not the property of the state, and government cannot stifle access to educational opportunity through censorship.
>
> These are important national issues in education, and they far transcend the characterization of the issues as described in the panel opinion. As we understand it, these free speech claims could have been brought even in the absence of a specific episode, so the concern about judicial micromanagement of sports eligibility questions is not really the core question here. Accountability of public education officials, and access to information that allows informed educational choice and access to quality education are the critical issues in this litigation.[3]

Those words are just as apt today.

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[3] Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Exhibit E, 5-6 and 8-9, *Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n*, 535 U.S. 971 (2002) (No. 01-1117).

STATEMENT OF THE CASE

This is a case about the right of private secondary schools to provide accurate information to prospective students and their parents and, at least as important, the right of those individuals to gather the information that will assist them in deciding whether and where to apply for admission. The Tennessee Secondary School Athletic Association ("TSSAA" or "Tennessee Association") coordinates, supervises, and regulates interscholastic athletic competition among both public and private high schools in Tennessee.[4] This Court has previously held that the Tennessee Association is a state actor for purposes of 42 U.S.C. § 1983. *Brentwood Acad.* v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) ("*Brentwood I*"). Brentwood, a private high school, is one of approximately 370 schools that participate in the Tennessee Association. *Brentwood Acad.* v. *Tennessee Secondary School Athletic Ass'n*, 304 F. Supp. 2d 981, 992 (M.D. Tenn. 2003). About 50 of those 370 schools are private. *Id.* Brentwood and the TSSAA dispute whether a TSSAA rule that places significant limits on speech by member schools to prospective students and their parents violates the First Amendment.

The TSSAA's bylaws contain a "Recruiting Rule" that, read with its guidelines, broadly bars communications between prospective students and their parents and the schools they may be considering. Section 21 provides that:

> [t]he use of undue influence on a student (with or without an athletic record), the parents or

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[4] As the district court observed, "the TSSAA is effectively the only game in town" for interscholastic athletics in Tennessee. 304 F. Supp. 2d at 997. All public high schools in Tennessee that compete in interscholastic sports are members of the TSSAA, J.A. 291-292, and the TSSAA does not permit its member schools to play non-member schools. J.A. 192-194.

> guardians of a student by any person connected, or not connected, with the school to secure or retain a student for athletic purposes shall be a violation of the recruiting rule.

J.A. 181.[5] The guidelines to the Rule then make clear that, in order to avoid "undue influence" on prospective students (including students "without an athletic record"), Section 21 effectively prohibits virtually all school-initiated "contact" of prospective students who may engage in athletics:

> Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?
>
> A. Some examples are, but not limited to:
>
> * * *
>
> 3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.
>
> 4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

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[5] "J.A." refers to the parties' joint appendix filed in this Court. References to the trial transcript that are not included in the joint appendix are cited by date and page number.

J.A. 182.[6] The result, as phrased by the chair of the Tennessee Association's Board of Control, Michael Reed, is that "[a]nything that a coach or someone within the community does or says to an athlete trying to get him to go to a certain school is undue influence." Trial Tr., Dec. 17, 2002, at 1354-55. This is so without regard to the intent of the speaker since, as the executive director of the Tennessee Association testified, "there can be a violation of the Recruiting Rule without an 'intent' to violate," 304 F. Supp. 2d at 992.[7]

On their face, the guidelines also appear to restrict speech on behalf of a school even when a student initiates a discussion. The guidelines declare that "a coach" in particular "may not contact a student or his or her parents prior to his [or her] enrollment in the school," J.A. 181, a provision schools have understood to mean that coaches may not speak to prospective students at all before enrollment. For example, Ellis Haguewood, the headmaster of the Memphis University School, testified that "[the] recruiting rule forbids any contact, not just initial contact, with a coach at that school before the student is enrolled." Trial Tr., Dec. 13, 2002, at 588. Furthermore, even if the general ban on contact by coaches only prevented *initial* contact, the guidelines would still unequivocally prohibit coaches from discussing "financial aid based on need" with any prospective student, no matter who initiates the discus-

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[6] A feeder pattern is a form of affiliation between schools where the students of one school routinely "feed" into the other — *i.e.* attend the other — when they graduate. As the district court observed, "the bottom line is that schools in a 'feeder pattern' can make certain school-initiated, targeted speech that schools, such as Brentwood Academy, outside the 'feeder pattern,' cannot make." *Brentwood Acad.*, 304 F. Supp. 2d at 996.

[7] The assistant executive director of the Tennessee Association testified as well that "[w]e don't get into intent. I mean the rule doesn't speak to intent." Trial Tr., Dec. 30, 2002, at 2580.

sion, until after a student has already enrolled and attended three days of school. Explicitly barred is any:

> [d]iscussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). . . .

J.A. 182. The Recruiting Rule therefore significantly impairs the ability of students and their parents to choose a school on the basis of the need-based financial aid the student might receive.[8]

In 1997, the Tennessee Association began investigating Brentwood after coaches at other schools complained that Brentwood had violated TSSAA rules. In the spring of 1997, Brentwood's athletic director and football coach, Carlton Flatt, sent a form letter to "all incoming ninth grade male students[] whose parents had already signed enrollment contracts" inviting the students to participate in spring football practice. *Brentwood Acad.*, 304 F. Supp. 2d at 986. At the time Coach Flatt sent the letter, the rules of the Tennessee Association permitted spring practice and allowed incoming students to participate. *Brentwood Acad.* v. *Tennessee Secondary Schools Athletic Ass'n*, 442 F.3d 410, 419 n.2 (6th Cir. 2006). After parents of some incoming students asked whether attendance at the practices was mandatory, Flatt made follow-up calls to

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[8] Undisputed testimony before the trial court from the Tennessee Association itself demonstrated that need-based financial aid to students at Brentwood was just that. Bernard Childress, an assistant executive director of the Tennessee Association, testified without contradiction that his job was to ensure that the financial aid schools gave was truly need-based. Determinations of need are initially made by an out-of-state independent firm and then policed by Childress to assure strict compliance with TSSAA rules. Childress testified that all the cases he had seen indicated that Brentwood's aid was need-based. Trial Tr., Dec. 30, 2002, at 2584-2587.

students' families clarifying that attendance was completely optional. Nonetheless, after coaches at other schools complained to the TSSAA, the TSSAA concluded that the form letter and the clarifying phone call had violated the Recruiting Rule. As punishment, Brentwood's entire athletic program was placed on probation for four years, its football and boys' basketball teams were prohibited from engaging in off-season practice and declared ineligible for the playoffs for two years, and Brentwood was fined $3,000. *Brentwood Acad.* v. *Tennessee Secondary Schools Athletic Ass'n*, 13 F. Supp. 2d 670, 676-78 (M.D. Tenn. 1998), 180 F.3d 758 (6th Cir. 1999), *rev'd*, 531 U.S. 288, 293 (2001).[9]

After unsuccessful appeals within the Tennessee Association, Brentwood brought this federal action against the TSSAA and its executive director. Brentwood sued under 42 U.S.C. § 1983 for, among other things, violations of its First Amendment right to free speech. In July 1998 the district court granted partial summary judgment in favor of Brentwood, holding that the Tennessee Association was a state actor, that the Recruiting Rule was a content-based regulation of speech subject to strict scrutiny, and that the Rule violated the First Amendment both facially and as applied.

The Court of Appeals for the Sixth Circuit initially reversed on the ground that the Tennessee Association was not a state actor. Brentwood petitioned for a writ of certiorari and the writ was issued. This Court reversed the Sixth Circuit, holding that the Tennessee Association is a state actor for purposes of 42 U.S.C. § 1983. *Brentwood I*, 531 U.S. 288.

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[9] A second charge, beyond the scope of this brief, related to the alleged furnishing of two tickets to a football game to two eighth-grade student-athletes. *See Brentwood Acad.*, 442 F.3d at 435-38 (holding Brentwood's procedural due process rights had been violated in regard to the ticket allegations).

On remand the court of appeals reversed the district court's summary judgment ruling, rejecting its First Amendment analysis on the theory that the Recruiting Rule was not a content-based rule subject to strict scrutiny, but rather a content-neutral time, place, and manner regulation subject to intermediate scrutiny. *Brentwood Acad.* v. *Tennessee Secondary Schools Athletic Ass'n*, 262 F.3d 543, 552 (6th Cir. 2001). The case was remanded to the district court to determine, among other things, if the Recruiting Rule, as applied to Brentwood, violated the First Amendment.

After a bench trial, the district court concluded that the Recruiting Rule as applied to Brentwood violated the First Amendment and that the penalties imposed by the Tennessee Association against Brentwood were void. 304 F. Supp. 2d 981 (M.D. Tenn. 2003).

The Tennessee Association appealed, the Sixth Circuit upheld the district court's decision, 442 F.3d 410 (6th Cir. 2006), and this Court issued a writ of certiorari.

ARGUMENT

The Recruiting Rule Is a Content-Based Restriction on Speech that Violates the First Amendment

The First Amendment rights at issue here arise in an athletic context, but their importance reaches far beyond sports. Whatever this Court decides, its ruling will directly affect parents' ability to receive the information they need to determine the right school for their children. If parents cannot learn, before they decide which secondary school their children will attend, about the nature of the programs that schools offer, and specifically about whether their children will be eligible for need-based financial aid, they may well be deprived of the very information they need most in order to make their decision. At the same time, the Tennessee Association's Recruiting Rule makes it more difficult for private high schools to compete for students. Most public high schools have certain natural advantages over most private high schools. They do not charge tuition, they have networks of middle schools that automatically send them students every year, and they are geo-

graphically convenient to the parents and students they serve. The many private schools without these advantages must therefore cultivate other strengths in order to compete. When regulators effectively preclude schools from speaking to prospective students about school programs and financial aid, private schools suffer in a way that their public brethren do not. Such restrictions inhibit robust competition for students and so prevent meaningful school choice.

As interpreted by the Tennessee Association, the Recruiting Rule barring "undue influence" to "secure or retain" students "for athletic purposes" severely limits private schools from speaking with prospective students or their parents. Specifically, as interpreted by the official guidelines, the Rule prohibits schools from engaging in "any initial contact or prearranged contact" with individual prospective students. J.A. 182. The guidelines single out coaches for special speech restrictions. Before students are enrolled, coaches are barred from contacting them and from discussing need-based financial aid at all, even if the student initiates contact. J.A. 181-82. The impact of the Recruiting Rule is therefore to ban discussion of entire topics — athletics and need-based financial aid — by particular persons for long periods of time. All this is done in a supposed effort to prevent truthful speech from having an "undue influence" on students and parents choosing between public and private schools. But as defined and enforced, the effort to avoid "undue influence" has resulted in a flat ban on speech highly relevant to a parent's informed decision as to which school her child should attend.

As the district court concluded in July of 1998, the Recruiting Rule is thus a content-based restriction of speech subject to strict scrutiny under the First Amendment. The Sixth Circuit misapprehended the nature of First Amendment law, misinterpreted the Rule as content-neutral, and proceeded to decide the cause on that basis. Although Brentwood ultimately prevailed in its as applied challenge to the Rule, this

Court's decision to grant review makes this a propitious time to correct the Sixth Circuit's inapt legal analysis and, having done so, to affirm on that basis.[10]

I. On Its Face, the Recruiting Rule Is a Content-Based Restriction on Speech

A content-based regulation controls speech based on what is said — the content of a message, not the time, place, or manner in which the message is communicated. There are at least three kinds of content-based regulations relevant to this case.[11]

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10 The broadly phrased question presented in this case was "whether the Sixth Circuit correctly held . . . that TSSAA violated the First Amendment . . . rights of Brentwood Academy . . . . " Pet. at i.

11 The merits brief of Brentwood Academy and the brief *amici curiae* of the Roman Catholic Diocese of Nashville, Tennessee, and Father Ryan High School both addressed the various efforts of the TSSAA to persuade the Court that Brentwood either waived its constitutional rights or should be deemed to be otherwise precluded from asserting them. We offer one additional observation with respect to the Solicitor General's brief arguing that this case is akin to those involving government funding or programs. It is that the two cases chiefly relied upon in that brief are of little more than passing relevance here. *Rust* v. *Sullivan*, 500 U.S. 173 (1991) involved (and was rooted in) the power of Congress to "fund one activity to the exclusion of [an]other." *Id.* at 193. Here, as the petition itself observed (pp. 29-30), the Tennessee Association "receive[s] no state funding and finances [its] operations through modest membership dues and gate receipts at tournament games." In *Cornelius* v. *NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985), this Court concluded that the government does not violate the First Amendment when it prevents certain organizations from participating in a charity drive aimed at federal employees. Of course, no access to a government program is sought by Brentwood here and what *Cornelius* did *not* say is that the government could conceivably have conditioned an organization's inclusion in the charity drive on a waiver

Footnote continued on next page.

First, this Court has observed that the apprehension of "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). If a rule is passed chiefly for reasons relating to the effect of expression on listeners — for example, to prevent listeners from learning about a particular topic — the rule is content-based even if it does not directly prohibit particular viewpoints, topics, or types of speakers. *Id.*, *see also United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 811 (2000) (finding a regulation to be content-based when the "overriding justification for [a] regulation is concern for the effect of the subject matter on young viewers").

Second, this Court has held that a rule can be content-based even if it does not prohibit the expression of a particular point of view but merely prohibits discussion of a topic or subject matter. *Consol. Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980); *see also Arkansas' Writers Project, Inc.* v. *Ragland*, 481 U.S. 221, 230 (1987). Thus a rule prohibiting discussion of financial aid or athletics is, by its nature, content-based.

Third, rules dictating which speakers may address a topic are content-based. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 784-85 (1978) (the state may not dictate "the speakers who may address a public issue"); *cf. Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995) (a parade is a form of speech, not merely a form of association, and control over the selection of speakers/participants in a parade is a content-based regulation of that speech).

Footnote continued from previous page.

of its First Amendment rights. *See 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 513 (1996) ("Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right.")

The Tennessee Association's Recruiting Rule is a content-based regulation in all three ways identified above.

The text of the Rule is expressly concerned with, and only concerned with, the feared effect that speech may have on the students and parents who listen to it. The Rule is therefore content-based under this Court's analysis in *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). *Forsyth County* concerned a parade ordinance that permitted a government administrator to vary the fee for parading to reflect the estimated cost of maintaining public order. This Court held that the ordinance was content-based, in part, because the County justified its fee by looking to costs associated with the public's reaction to the content of the message conveyed by the parade:

> In order to assess accurately the cost of security for parade participants, the administrator must necessarily examine the content of the message that is conveyed, estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.
>
> Although petitioner agrees that the cost of policing relates to content, it contends that the ordinance is content neutral because it is aimed only at a secondary effect — the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification has nothing to do with content.

Forsyth County, 505 U.S. at 134 (internal citations and quotation marks omitted). If the ordinance in *Forsyth County* was content-based because its administration required contemplation of the public's reaction to speech, then the Recruiting Rule's limits on discussion between schools, the parents of

students who might attend them, and the prospective students themselves to assure that the forbidden speech does not unduly influence those who hear it is more than enough to make the Rule content-based.

Likewise, the text of the Rule and its guidelines make it clear that the Rule is designed to preclude discussion of particular topics and to limit which speakers may address them. Whether a school representative may speak to a prospective student depends entirely on whether that representative's speech is related to recruitment or athletics. The Rule is explicitly concerned with limiting schools' ability to "secure or retain" students "for athletic purposes." Moreover, the Rule's guidelines make clear that the Rule prohibits school-initiated speech with any prospective student — speech obviously related to recruitment — for any reason:

> Some examples are . . .
>
> * * *
>
> 3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.
>
> 4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Since the text of the Rule itself defines students covered by the rule as persons "with or without an athletic record," the commentary effectively bars school representatives from initiating any discussion with any prospective student so long as it is "for athletic purposes." And since "there can be a violation of the Recruiting Rule without an 'intent' to violate," 304 F. Supp. 2d at 992, a great deal of speech to students who never have and never will participate in sports may be deemed to violate the Rule.

The guidelines also limit which speakers may address particular topics, explicitly prohibiting coaches from "contacting a student or his or her parents" and from engaging in any "discussion of financial aid based on need" with a prospective student until the student has already enrolled and has been at the school for at least three days. J.A. 182. The natural and obvious intended impact of singling out coaches for a total ban on pre-enrollment speech (and, in particular, a total ban on pre-enrollment speech with students about financial aid) could hardly be clearer: it prevents students and their parents from learning much about a school's athletic program and virtually anything about the availability of need-based financial aid before they decide whether to apply — in short, from learning enough to determine whether the school is right for them at the time it is most important to have that information.

If there were any doubt about this, testimony in the trial makes plain that the punishment of Brentwood was content-based. The chair of the Tennessee Association's Board of Control, Michael Reed, directly admitted this:

> Q. . . . Now let me just ask you once again to look at the spring practice letter and the basis for the board's decision, the consensus decision of the Board of Control. As I understand it, the factors that went into you determining that this was a violation were the message of the spring practice letter, the person that wrote the letter, which was Coach Flatt, the person who received the letter, the fact that the students were enrolled in other schools, and the impact that the message had on the students or that you thought it would have on the students?
>
> A. Content of the letter.
>
> Q. Okay.
>
> A. The message that it sends.
>
> * * *

> Q. . . . I just want to make sure I have all the factors that led you to convict Brentwood Academy based on this letter.
>
> A. Okay. You have got -- you have the letter going out to athletes.
>
> Q. The fact it was from Coach Flatt, correct?
>
> A. It was from Coach Flatt.
>
> Q. A famous coach?
>
> A. A well known coach.
>
> Q. A well known coach?
>
> A. Okay.
>
> Q. The impact it's going to have on the reader?
>
> A. Right.

Trial Tr., Dec. 17, 2002, at 1397-1399. As the district court noted in its opinion, the executive director of the Tennessee Association gave similar testimony to the effect that "the Spring Practice Letter and follow-up calls were harmful undue influence because of their contents." 304 F. Supp. 2d at 991 (summarizing testimony). Given this and other evidence, the district court determined that the punishment of Brentwood was content-based:

> The Court finds that the preponderance of the credible evidence at trial is that the substantive "content" of the Spring Practice Letter and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted "undue influence" and violated the Recruiting Rule. The TSSAA penalized Brentwood Academy for the substantive "content" of the Spring Practice Letter and calls and the message they conveyed in this case.

Brentwood Acad., 304 F. Supp. 2d at 992 n.4.

Nothing in either opinion of the court of appeals after this case was last passed upon by this Court provides any basis for

concluding that the speech restrictions imposed by the TSSAA were anything but content-based. That "the recruiting rule does not constitute a total ban on communications between secondary schools and prospective students regarding athletic programs." *Brentwood Acad.*, 262 F.3d at 552, 442 F.3d at 430 n.14, is beside the point. Here, as in *United States* v. *Playboy Entertainment Group, Inc.*, "[i]t is of no moment that the [rule] does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree . . . . [C]ontent-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans." 529 U.S. 803, 812 (2000). The threshold question is whether the Recruiting Rule is content-based, not whether it constitutes a "total" ban.

The court of appeals was similarly mistaken when it relied on the availability of other channels of communication for Brentwood's message — media other than school-initiated contact — as a reason why the ban on speech was not content-based. 262 F.3d at 552. Brentwood, the court wrote, has "multiple ways of communicating with middle school students to provide them with information about the academic, athletic, and spiritual aspects of the educational experience at Brentwood." 262 F.3d at 552. In essence, the court of appeals concluded that the Recruiting Rule was not content-based because the Rule did not entirely destroy Brentwood's ability to communicate. Such reasoning is directly at odds with this Court's decisions. *See Linmark Assocs., Inc.* v. *Twp. of Willingboro*, 431 U.S. 85, 94 (1977) (that a rule bans "only one mode of communication . . . does not transform [the rule] into a 'time, place, or manner' case"); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 430 (1993) (a regulation of expression that is neither content-neutral nor narrowly tailored is not a legitimate time, place, or manner restriction "regardless of whether or not it leaves open ample alternative channels of communication").

The Sixth Circuit was also in error when it relied on the supposed lack of evidentiary support for the position that the Recruiting Rule was "designed by TSSAA out of fear of what prospective students would learn about the athletic programs

at independent secondary schools." *Brentwood Acad.*, 262 F.3d at 553. If the Recruiting Rule was passed chiefly because of the effect schools' speech would have on listeners, the Rule is content-based even if it was not passed out of such a fear. And as the text of the Rule itself plainly seeks to prevent "undue influence" on students and their parents, the self-evident purpose of the Rule is to control the effect of speech on listeners. What else could the purpose possibly be of barring coaches from discussing need-based financial aid with prospective students? Moreover, evidence set forth above in the trial that followed the Sixth Circuit's decision demonstrated conclusively that the Rule *was* indeed "designed by TSSAA out of fear of what prospective students would learn about the athletic programs at independent secondary schools."

The Sixth Circuit's last reason for concluding that the Rule was not content-based was that while coaches were subjected to special limits on their speech, they were not completely deprived of the ability to communicate with students:

> Although the rule emphasizes that coaches and members of the coach's staff must refrain from exerting "undue influence" by initiating contact with prospective students, the rule does not ban these persons from communicating with students who themselves initiate contact.

Brentwood Acad., 262 F.3d at 553. This reasoning is flawed on several levels. As an initial matter, it is not at all clear that coaches are permitted even to respond to queries from prospective students and certainly not about need-based financial aid. More fundamentally, even if coaches were permitted to respond to direct questions, their inability to utter a word about the availability of need-based financial aid without being asked remains a substantial — and surely an intended — barrier to meaningful communication. The restrictions on the speech of coaches are, on their face, plainly content-based.

II. The Recruiting Rule Cannot Withstand Strict Scrutiny

Once the Recruiting Rule is correctly treated as a content-based restriction, its unconstitutionality is readily apparent.

Content-based restrictions of speech are "presumptively invalid," *R.A.V.* v. *St. Paul*, 505 U.S. 377, 382 (1992), and the Recruiting Rule does not rebut that presumption. In order to overcome the presumption of invalidity, a state must show "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 231 (1987). To be "narrowly drawn," the law must be the "least restrictive means" to further the government's articulated interest. *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989).

The district court concluded that there were three state interests supporting the Recruiting Rule: (1) "keeping high school athletics 'in their proper place' subordinate to academics"; (2) "protecting student-athletes from 'exploitation'"; and (3) "fostering a 'level playing field' between schools for 'competitive equity.'" *Brentwood Acad.* v. *Tennessee Secondary School Athletic Ass'n*, 304 F. Supp. 2d 981, 994 (M.D. Tenn. 2003).[12] While the state clearly has a compelling interest in protecting student-athletes from exploitation, and a substantial interest in subordinating athletics to academics, its "interest in controlling which schools or teams win athletic contests" is not even substantial. *Brentwood Acad.*, 304 F. Supp. 2d at 994. Students may well be more inclined to participate in sports if there are more schools with a good chance of winning a championship, but most students will never win a championship, and they know it, yet they still choose to play. High school sports can and do thrive in the absence of enforced parity. In any event, competitive equity between pub-

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12 The Tennessee Association did not proffer the third interest until its 2001 appeal to the Sixth Circuit.

lic and private schools has become an even weaker justification for the Recruiting Rule since the Tennessee Association segregated private schools that offer need-based financial aid into a separate division. J.A. 145-46. Because private schools such as Brentwood no longer compete with public schools, they pose less of a threat to the win-loss records of public school coaches.[13]

In contrast, the state's interest in keeping athletics subordinate to academics is certainly important and arguably compelling, and its interest in preventing the exploitation of students is unquestionably compelling. The Recruiting Rule, however, is not narrowly drawn to fit either of these interests. The Rule prevents schools from telling prospective students and their parents about athletic programs, and it frustrates schools' ability to speak about the availability of need-based financial aid. Informing students of such things does not, in and of itself, denigrate academics or exploit students. To the contrary, it allows students and parents to make an informed judgment as to whether a particular school would be worth the cost of tuition. Such information is crucial if private schools are to attract lower-income students and their parents. Bill Brown, the former headmaster and the founder of Brentwood Academy, testified to that effect when he explained why Brentwood challenged the constitutionality of the Recruiting Rule. In particular, Brown noted that providing information about sports to prospective students and their parents directly

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13 The well-being of coaches seems to be a significant concern for the Tennessee Association. As the district court noted, "[TSSAA Executive Director] Carter stated that the absence of any Recruiting Rule would result in a 'war zone' and *coaches' resignations*." 304 F. Supp. 2d at 992 (emphasis added). Likewise, Morris Rogers, a member of the Tennessee Association's Board of Control, acknowledged that the Recruiting Rule's "obvious" purpose was "really for protection of schools and coaches." J.A. 368.

serves to advance the cause of academics because it helps private schools reach students who might otherwise eschew the rigorous curriculum of a school like Brentwood. Sports draw the attention of lower-income parents who are less likely to be aware of other aspects of Brentwood's educational mission:

> Q. . . . . What was your — your third concern or reasons for pursuing the litigation?
>
> A. Well, we wanted to be sure — the way I worded it was defending the school to operate and tell the story in the community and [to] prospective families who had expressed interest in Brentwood Academy, including those who can assure diversity within our student body, which was very difficult for us to do. We were very concerned about going into the lower income families, we needed more in that area, and it's very difficult for them to get the story unless you're proactive in giving it. The only thing they hear is the sports page and they hear the athletic side, so that's a lot of times that's why you help them with lower income families so many people who have athletic backgrounds investigating independent schools.

Trial Tr., Dec. 30, 2002, at 2482-83. Ellis Haguewood, the headmaster of the Memphis University School, testified to the need to speak about financial aid:

> Q. Do you find at all that the affluence of the parents is a factor in selection of public versus private schools?
>
> A. Yes.
>
> Q. How so?
>
> A. Because we charge tuition, and so right off you have a choice of not paying or a choice of having to pay to go to a private school. And so there is that barrier immediately in the minds of the parents who [think], well, I can't afford [an]

> independent school. Not even — won't even consider it because of the cost of the tuition, not knowing necessarily that there's need based financial aid available, just doesn't have that information.

Trial Tr., Dec. 13, 2002, at 595. Taken together, these passages well illustrate the vices of the Recruiting Rule's speech restrictions. If sports are a tool for drawing the attention of lower-income parents, and if need-based financial aid is a crucial factor in convincing lower-income parents to enroll their children, then the Recruiting Rule's prohibition against coaches talking to students and parents about need-based financial aid is surely a serious impediment to school choice.[14]

The Recruiting Rule is hardly the least restrictive means to further the state's interests in keeping athletics subordinate to academics and in preventing the exploitation of students. There are many narrower alternatives, including some that would not burden speech at all. Indeed, the Tennessee Association already has rules and guidelines that serve the state's interests. After this case began, it banned spring practices. *See Brentwood Acad.*, 442 F.3d at 419 n.2. The Recruiting Rule itself prohibits fraudulent, coercive or harassing conduct, such as "offering an incentive or inducement to a student." J.A. 181. Other rules restrict current high school students' ability to transfer to other schools for athletic purposes by limiting their athletic eligibility and by making schools forfeit games in which ineligible students participate. J.A. 167-76. In addition, financial aid must be need-based, and "[s]chools shall remove any student from athletic eligibility whose accounts with the school are 60 days overdue." J.A. 187-88. Yet another TSSAA rule provides that "[s]tudents shall be

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[14] A detailed analysis of the benefits to students from participating in school-based athletics is set out in Section II(b) of the brief *amicus curiae* of the National Women's Law Center.

regularly enrolled, in regular attendance, and carrying at least five full courses." J.A. 151. This last rule suggests another avenue the Tennessee Association could take to further its interests: instead of inhibiting school choice, it could demand better academic performance from student-athletes. At present, students can compete so long as they earn at least a "D-" in all of their courses. J.A. 150-151; J.A. 408. The Tennessee Association could dramatically advance its ostensible goals, if it chose to, by raising that requirement.

Finally, the Recruiting Rule's ban on speech to parents deserves special emphasis in any discussion of its overbreadth. While it is troubling enough to insist that children must be sheltered from information about their educational options, it is especially offensive to conclude that the First Amendment permits a state entity to keep parents ignorant of such options.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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